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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEACE AND FREEDOM PARTY, et. al.,

Plaintiffs,

v.

DR. SHIRLEY N. WEBER, CALIFORNIA
SECRETARY OF STATE,

Defendant.

3:24-cv-08308-MMC

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS' AND
INTERVENORS' MOTIONS TO
DISMISS [ECF Nos. 34&35]**

Courtroom: 7
Judge: Hon. Maxine M. Chesney
Hearing Date: August 22, 2025
Action Filed: November 21, 2024

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**PLAINTIFFS' MEMORANDUM OF
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Courtroom: 7
 Judge: Hon. Maxine M. Chesney
 Hearing Date: August 22, 2025

I. PROCEDURAL POSTURE

The Complaint was filed in the above-captioned case on November 21, 2024 [ECF #1]. On January 31, 2025, Defendant Weber filed a motion to dismiss and supporting papers [ECF #20]. Also on January 31, 2025, Intervenor filed a motion for leave to intervene, along with a proposed motion to dismiss [ECF #19]. The motion to intervene was denied on February 10, 2025 [ECF #25]; however, following an agreement between Plaintiffs and the Intervenor [See ECF #26] and Defendant Weber's consent to the intervention [ECF #28], the Court entered an Order permitting the intervention [ECF #31].

On February 21, 2025, Plaintiffs filed their First Amended Complaint ("FAC") [ECF #29], rendering the motion to dismiss filed by the Defendant and the proposed motion to dismiss

proffered by the Intervenor's moot [ECF ##30, 31]. On April 11, 2025, Intervenor's filed a motion to dismiss the First Amended Complaint [ECF #34]. Defendant Weber filed her motion to dismiss and an amended motion to dismiss also on that date [ECF ##35, 36]. Defendant and Intervenor's are aligned in their attack on the First Amended Complaint and their arguments overlap. For purposes of efficiency, Plaintiffs now file their consolidated Opposition to the motions to dismiss. Plaintiffs will address the Defendant's Motion to Dismiss and then address any additional issues in the Intervenor's motion not covered.

II. INTRODUCTION

Plaintiffs herein challenge California's Top-Two election system as violative of their First and Fourteenth Amendment rights. The Defendant and the Intervenor's primary basis for urging a dismissal of the FAC is that the Top-Two system was upheld by the California state courts in 2015 and therefore this action is barred by *res judicata*. They are mistaken and their arguments misapprehend fundamental principles of ballot access law which require, not just a case by case, fact-specific analysis to ballot access restrictions as applied, but which require, as well, a consideration of ballot access history since the imposition of the restriction.

Plaintiffs do not bring this challenge in a vacuum and certainly were aware of the decision in the case on which the *res judicata* argument relies, *Rubin v. Padilla*, 233 Cal. App. 4th 1128 (2015).

Rather, Plaintiffs assert in their FAC the more than plausible claim that in light of the unassailable fact that: "In the years since the passage of Proposition 14 and the adoption of the Top-Two primary in California, when there is at least one Republican on the primary ballot and one Democrat on the primary ballot no minor party candidate ever finishes in the top two."

[FAC at ¶27](Emphasis added).¹

Ten years have passed since the decision in *Rubin* and the evidence during those years

¹ There is only one single exception to this historical fact in any election subject to Top-Two since its enactment. In the 2024 Top-Two primary for California State Assembly District 18, the American Independent Party candidate, Andre Sandford finished second by a few votes over two Republican candidates who split the Republican vote. The Democratic party candidate overwhelmingly finished first. The split was Dem: 84.9%; AIP: 5.3%; Rep: 5.1%; Rep: 4.7%. California Secretary of State's *Statement of Vote*.

1 further establishes the unconstitutionally insurmountable barrier to gaining ballot access for minor
 2 parties and independent candidates the Top-Two primary law imposes. *See e.g., Mandel v.*
 3 *Bradley*, 432 U.S. 173, 177 (1977) (Past experience will be a helpful, if not always an unerring,
 4 guide: it will be one thing if candidates have qualified with some regularity and quite
 5 a different matter if they have not.), *quoting from, Storer v. Brown*, 415 U.S. 724, 742 (1974);
 6 *Libertarian Party of Arkansas v. Thurston*, 632 F. Supp. 3d 855, 892 (E.D. Ark. 2022)(“...
 7 parties’ past success or failure in a particular state under extant or prior requirements is relevant
 8 to show the necessity or burdensomeness of the restrictions, and such history is also material to
 9 the question of whether the statutes are narrowly tailored to a compelling state interest...”); *Lee v.*
 10 *Keith*, 463 F.3d 763, 769 (7th Cir. 2006)²

11 To date the fundamentally important ballot access implications still have not been
 12 considered by any federal court.

13 The clear and unequivocal history over the more than a decade since the enactment
 14 of Top-Two and over the ten years since the decision in *Rubin*, has proven that the barrier to
 15 minor parties gaining access to the general election ballot has been proven beyond question to be
 16 functionally insurmountable, constituting a severe burden by any measure, triggering strict
 17 scrutiny analysis under well-settled ballot access jurisprudence, and requiring compelling state
 18 interests and the application of the least restrictive means to achieve any such compelling
 19 interests.

20 There certainly are no compelling, important, or even rational, legitimate state interests in
 21 limiting the general election ballot to two candidates, especially in light of the indisputably
 22 demonstrated discriminatory impact this has had on minor parties, their candidates, and
 23 supporting voters.

24 Top-Two violates Plaintiffs’ First and Fourteenth Amendment rights and, most relevant for

25 ² “The Supreme Court has held that ballot access history is an important factor in
 26 determining whether restrictions impermissibly burden the freedom of political association: “Past
 27 experience will be a helpful, if not always unerring, guide: it will be one thing if independent
 28 candidates have qualified with some regularity and quite a different matter if they have not.”
Storer, 415 U.S. at 742. The “inevitable question for judgment” is whether “a reasonably diligent
 independent candidate [could] be expected to satisfy the signature requirements, or will it be only
 rarely that the unaffiliated candidate will succeed in getting on the ballot?”

1 the instant purposes, Plaintiffs' claims in the FAC are more than plausible and must be permitted
2 to go forward.

3 Plaintiffs will make a couple of preliminary points, present the analytical framework for the
4 kind of ballot access challenges presented by the case, and will then address the specific
5 arguments in the Defendant's Motion to Dismiss, along with any position taken by the
6 Intervenor-Defendants not otherwise addressed in the response to the Defendant's motion.

7 **III. PRELIMINARY POINTS**

8 There are two preliminary points to be made before discussing the applicable legal standard
9 for the Court's evaluation of the motions to dismiss and the substantive opposition.

10 **A. Judicial Notice is to be Used Sparingly**

11 First, the Defendant and Intervenor have made voluminous submissions in support of their
12 motions. The bulk of their respective filings are comprised of matters with respect to which they
13 each ask the Court to take judicial notice. In evaluating a Rule 12(b)(6) motion to dismiss, a
14 court's consideration generally is limited to the allegations in the pleadings, exhibits attached to
15 the Complaint and matters properly subject to judicial notice. *Genasys Inc. v. Vector Acoustics,*
16 *LLC*, 638 F. Supp.3d 1135 (S.D. Cal. 2022). However, courts must be cautious and should only
17 take judicial notice of facts that are undisputed and relevant to the issues presented in the motion
18 to dismiss and should not draw inferences in favor of the defendant based on extrinsic evidence.
19 *Metropolitan Creditors' Trust v. Pricewaterhousecoopers, LLP*, 463 F.Supp.2d 1193 (E.D. Wash.
20 2006); *Malheur Forest Fairness Coalition v. Iron Triangle, LLC*, 699 F. Supp.3d 1086 (D. Ore.
21 2023). Indeed, the Ninth Circuit has emphasized a cautious approach to judicial notice in the
22 context of Rule 12(b) motions to dismiss, especially when the facts at issue are in dispute and the
23 request for judicial notice is especially broad, making it clear, *inter alia*, that judicial notice
24 should not be used to reject factual allegations in a plaintiff's Complaint. *See CPI Advanced, Inc.*
25 *v. Kong Byung Woo Comm. Ind. Co., Ltd*, 135 Fed. Appx. 81 (9th Cir. 2005); *Motul S.A. v. USA*
26 *Wholesale Lubricant, Inc.*, 686 F. Supp.3d 900 (N.D. Cal. 2023)(the court cannot take judicial
27 notice of disputed facts in the proffered records); *Metropolitan Creditors' Trust, Id*; *Malheur, Id*.

(denying judicial notice where the defendant sought to introduce extrinsic evidence to disprove plaintiff's factual allegations).

B. Intervenor's Cannot Independently Decide the State's Interests

Secondly, while intervenors may participate in litigation to ensure that their perspective is considered, they do not have the right or authority to determine or argue independently as to what the state's interests are in support of the legislative restriction at issue in the case. *See e.g., PEST Committee v. Miller*, 648 F. Supp.2d 1202 (D. Nev. 2009); *Brumback v. Ferguson*, 343 F.R.D. 335 (E.D. Wash. 2022). This is particularly relevant and important in a ballot access case in which, as will be discussed in greater detail below, the analytical framework requires a court to consider the character and magnitude of the burden on ballot access and then identify and evaluate the precise interests put forward by the State as justification for the burden imposed by the restriction at issue. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Whittaker v. Mallott*, 259 F. Supp.3d 1024 (D. Alaska 2017). And it is even more so where, as here, Plaintiffs allege that the ballot access restriction at issue is so onerous as to require strict scrutiny, and support by compelling state interests and the least restrictive means to accomplish those compelling interests. *See, e.g., Breck v. Stapleton*, 259 F. Supp.3d 1126 (D. Mont. 2017).

IV. LEGAL STANDARD FOR THE MOTION TO DISMISS

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *See id.* Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than . . . a formulaic recitation of the elements of a cause of action." *See id.* (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss," however, "a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is

plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *see Iqbal*, 556 U.S. at 678 (internal quotation and citation omitted).

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Beyond any question, the detailed factual allegations in the FAC state cognizable claims for relief and are not just plausible; they are verifiably true and accurate. The Motions to Dismiss must be denied.

V. **ANDERSON/BURDICK BALLOT ACCESS ANALYTICAL FRAMEWORK:**

As will be discussed below, the primary focus of the motions to dismiss is on the claim that certain plaintiffs' claims are barred by *res judicata*. That is a matter that is mainly outside traditional ballot access analysis and will be addressed below. However, ultimately the underlying issues in this case center around constitutional claims that the plaintiff parties' and candidates' rights to access to the general election ballot and plaintiff voters' rights to cast their votes to elect candidates and parties of their choice under the First and Fourteenth Amendments are being denied by California's Top-Two system. The Court must be guided by the *Anderson/Burdick* analytical framework in evaluating the claims.

The First and Fourteenth Amendments afford all candidates vying for elected office, and their voting constituencies, the fundamental right to associate for political purposes and to participate in the electoral process and espouse their political views. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson*, 460 U.S. at 787-88; *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Lee v. Keith*, 463 F.3d 763, 767-68 (7th Cir. 2006) (quoting *Clingman*, 544 U.S. at 586. Placing restrictions on candidates' and political parties' access to the ballot interferes with their right to associate for political purposes and the rights of qualified voters to cast their votes for the candidates of their choice. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (citing *Williams*, 393 U.S. at 30); *see also*

1 *Norman v. Reed*, 502 U.S. 279 (1992); *Anderson*, 460 U.S. at 786; *Ill. State Bd. of Elections v.*
 2 *Socialist Workers Party*, 440 U.S.173, 184 (1979).

3 Ballot-access requirements that place more burdensome restrictions on certain types of
 4 candidates than on others implicate rights under the Equal Protection Clause as well. *See*
 5 *Williams*, 393 U.S. at 30-31; *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695 (6th Cir.
 6 2015) (finding that a ballot access restriction that "imposes a greater burden on minor parties
 7 without a sufficient rationale put forth by the state . . . violates the Equal Protection Clause"); *see*
 8 *also Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1980); *Lubin v. Panish*, 415 U.S. 709, 713-
 9 714 (1974); *Libertarian Party of Ill. v. Ill. State Bd. of Elections*, 164 F. Supp. 3d 1023, 1029
 10 (N.D. Ill. 2016), *affirmed by, Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 523-24 (7th
 11 Cir. 2017)(discussing Equal Protection principles applied to restrictions which discriminate
 12 against minor parties in favor of major parties).

13 In striking down Ohio’s ballot access restrictions in *Anderson v. Celebrezze*, 460 U.S. 780
 14 (1983), the Court set out the requisite analytical framework as follows:

15 Constitutional challenges to specific provisions of a State’s election laws therefore cannot
 16 be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions. Instead, a
 17 court must resolve such a challenge by an analytical process that parallels its work in ordinary
 18 litigation. It must first consider the character and magnitude of the asserted injury to the rights
 19 protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then
 20 must identify and evaluate the precise interests put forward by the State as justifications for the
 21 burden imposed by its rule.

22 In passing judgment, the Court must not only determine the legitimacy and strength of each
 23 of those interests; it also must consider the extent to which those interests make it necessary to
 24 burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a
 25 position to decide whether the challenged provision is unconstitutional. *Anderson*, 460 U.S. at
 26 789. (Internal citation omitted).

27 In analyzing a particular burden to First and Fourteenth Amendment rights in the ballot
 28 access context, “the rigorousness of our inquiry into the propriety of a state election law depends

1 upon the extent to which a challenged regulation burdens First and Fourteenth Amendment
 2 rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Regulations imposing severe burdens on
 3 associational rights must be narrowly tailored to advance a compelling government interest.
 4 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Pierce v. Jacobsen*, 44 F.3d
 5 853, 862 (9th Cir. 2002)(state bears the burden of proving the regulation is narrowly tailored to
 6 meet the compelling interest). Regulations imposing lesser burdens are subject to less intensive
 7 scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve
 8 important regulatory interests. *Id.*

9 Where the State imposes only reasonable and genuinely neutral restrictions on associational
 10 rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial
 11 intervention. As such restrictions become more severe, however, and particularly where they have
 12 discriminatory effects, there is increasing cause for concern that those in power may be using
 13 electoral rules to erect barriers to electoral competition. In such cases, applying heightened
 14 scrutiny helps to ensure that such limitations are truly justified and that the State's asserted
 15 interests are not merely a pretext for exclusionary or anticompetitive restrictions.” *Clingman*, 544
 16 U.S. at 603 (O’Connor, concurring); *Id.* at 586-587 (“Regulations that impose severe burdens on
 17 associational rights must be narrowly tailored to serve a compelling state interest); *Republican*
 18 *Party of Minnesota v. White*, 536 U.S. 765, 774-775 (2002)(same); *California Pro-Life Council,*
 19 *Inc. v. Rudolph*, 507 F.3d 1172, 1178 (9th Cir. 2007).

20 “[W]hat is demanded (by the State) may not be so excessive or impractical as to be in
 21 reality a mere device to always, or almost always, exclude parties with significant support from
 22 the ballot. The Constitution requires that access to the electorate be real, not ‘merely
 23 theoretical.’” *American Party of Texas v. White*, 415 U.S. 767, 783 (1974).

24 In this analysis, "the burden is on the state to 'put forward' the 'precise interests ... [that are]
 25 justifications for the burden imposed by its rule,'" and to "explain the relationship between these
 26 interests" and the challenged provision. *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992)
 27 (quoting *Anderson*, 460 U.S. at 789). "The State must introduce evidence to justify both the
 28

interests the State asserts and the burdens the State imposes on those seeking ballot access." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985).

Courts are to determine the appropriate level of scrutiny based on the seriousness of the burden imposed. "Regulations imposing severe burdens ... must be narrowly tailored and advance a compelling state interest," while "[l]esser burdens ... trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (citations and internal quotation marks omitted).

In cases specifically addressing ballot access restrictions, courts look to the individual restrictions in light of the statutory scheme as a whole. *See Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015); *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008). "[T]he burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain place on the ballot, or whether they will rarely succeed in doing so." *Id.* (quoting *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 763 (1994)); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) ("In (the ballot access restrictions) setting, we have held that 'the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so.'" *Citing Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (quoting *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994)).

VI. DISCUSSION - THE DEFENDANT'S MOTION TO DISMISS

Each of the Defendant's arguments for dismissal will be addressed here *seriatim*.

A. This Case is Not Barred by *Res Judicata*.

The first argument for dismissal the Defendant makes is that this action is barred by *res judicata*, in light of the California state court decision in *Rubin v. Padilla*, 233 Cal.App.4th 1128 (2015) [ECF No. 35 at 2, 5-6, 8-11].

There are several reasons why this Court should not dismiss this action. Preliminarily, however, Plaintiffs would note that the Defendant has advised the Court that its *res judicata*

argument for dismissal is directed solely at Plaintiffs Peace and Freedom Party, Libertarian Party of California, and Green Party of California and should not be considered as a basis for dismissal of the claims brought by Plaintiffs American Solidarity Party of California, Lightfoot, Dehn, Dougherty, Patterson, Reveles, or Pittman [ECF No. 35 at 8, n.5].³ This is consistent with relevant *res judicata* on the subject. These latter plaintiffs were neither parties to the litigation in *Rubin* nor are they in privity with the litigating parties in *Rubin*. See e.g., *Perez-Guzman v. Gracia*, 346 F.3d 229, 234-235 (1st Cir. 2003).

The case also should not be dismissed on *res judicata* ground as to the three political parties to which this dismissal argument is directed.

(1) The Rubin Court Made Demonstrable Material Mistakes.

The court in *Rubin* indisputably based its decision on some mistaken material facts and conclusions. For example, the court in *Rubin*, cited as one purpose (and benefit) of Top-Two is that with the enactment of Top-Two, “membership in a qualified party is no longer a condition to participation in the primary election...” *Id.* at 1145. The undisputed fact of the matter is, since 2002, independents in California could vote in the Democratic or Republican primaries for congressional and state offices.

The *Rubin* court mistakenly understood that the primary under Top-Two is held exclusively in June before a November general election, *Rubin*, 233 Cal. App. 4th at 1137-1138. That is wrong. Indeed, one of the claims in the FAC is that the March primary that is held under the Top-Two system, in combination with the other restrictions imposed by Top-Two, renders Top-Two unconstitutional [ECF No. 29 at ¶¶33, 46]. It is undisputed that Top-Two requires a March primary in presidential election years. *Cal. Elec. Code §1202*. Tellingly, the court in *Washington State Grange v. Washington State Republican Party (Grange II)*, 676 F.3d 784, 794⁴ (9th Cir. 2012), in considering that State’s Top-Two system noted the unconstitutional burden the Court in

³ Intervenor-Defendants appear to argue that *res judicata* should apply to the individual plaintiffs as well; but their position should not be considered as a basis for dismissal in light of the Defendant’s express position to the contrary and, if considered, it should be rejected on the authority and rationale of *Perez-Guzman v. Gracia*, 346 F.3d 229, 234-235 (1st Cir. 2003).

⁴ There is a typographical error in the FAC with respect to this citation at ECF No. 29, n.2. The erroneous citation should be to page 794 of this case, not 894.

1 *Anderson* found a March deadline for minor parties and independents to be and expressly
2 distinguished the Washington scheme because it provided for a primary “... **in August, not**
3 **March.**” (Emphasis added).

4 The *Rubin* court at 233 Cal. App. 4th 1135, describes the Top-Two system as an “open
5 nonpartisan election, followed by a runoff between the top two candidates” and then concluded
6 that “for ballot access purposes, access to California’s primary election is constitutionally
7 indistinguishable from access to the general election.” *Id.* at 1146. That misguided assertion is
8 constitutionally indefensible. No one can be elected to office from the primary – even if only a
9 single candidate runs in the primary; moreover, it would be unlawful to elect a member of
10 Congress before November. *Foster v. Love*, 522 U.S. 67 (1997). If this is the Defendant’s
11 position in this case, then Plaintiffs would request an opportunity to amend their FAC to allege a
12 violation of federal statutory law for holding an “election” for federal legislators prior to
13 November. *Id.*

14 Similarly, the court in *Rubin* wrote that “[I]n deciding these cases, the Supreme Court never
15 distinguished doctrinally between access to the primary election and access to the general
16 election.” *Id.* at 1145, citing *Williams v. Rhodes*, 393 U.S. 23 (1968). That simply is not true.
17 The court in *Williams* clearly and unequivocally was concerned about access to the general
18 election ballot – a ballot from which candidates could be elected to office.

19 The *Williams* court was intent on striking down exactly the kind of monopoly California’s
20 Top-Two system has created for the major parties with respect to access to the general election
21 ballot. The Court in *Williams* wrote the following, which is especially applicable here: “The fact
22 is, however, that the Ohio system does not merely favor a “two-party system”; it favors two
23 particular parties -- the Republicans and the Democrats -- and in effect tends to give them a
24 complete monopoly. There is, of course, no reason why two parties should retain a permanent
25 monopoly on the right to have people vote for or against them. Competition in ideas and
26 governmental policies is at the core of our electoral process and of the First
27 Amendment freedoms.” *Williams, Id.* at 32.

1 It is pure nonsense to even suggest the leading ballot access cases since *Williams* “have not
 2 distinguished doctrinally between access to the primary election and access to the general
 3 election.” *Rubin* at 1145. The cases are concerned with access to the **general election ballot** –
 4 the only forum from which a candidate can be elected to office and in which a voter can elect a
 5 candidate into office. *See e.g., Mandel v. Bradley*, 432 U.S. 173 (1977); *See also, Storer v.*
 6 *Brown*, 415 U.S. 724, 728-729 (1974), citing *Williams*, 393 U.S. at 25(emphasizing that *Williams*
 7 distinguished between rights with respect to the primary and rights with respect to getting on the
 8 general ballot, writing that even when citizens are free to associate in the primary nominating
 9 process and to cast their votes in the general election, “... **the State must also provide feasible**
 10 **means for other political parties and other candidates to appear on the general election**
 11 **ballot.**”)(Emphasis added); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1363 (N.D. Ga.
 12 2016), *quoting from Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590 (6th Cir. 2006)(“In
 13 other words, the restrictions at issue in this case serve to prevent minor parties from engaging in
 14 **the fundamental political activity of placing their candidate on the general election ballot in**
 15 **hopes of winning votes and, ultimately, the right to govern.** The restrictions also limit the
 16 ability of voters to cast their votes effectively.”).⁵

17 Additionally, the court in *Rubin*, wrote that the Supreme Court in *California Democratic*
 18 *Party v. Jones*, 530 U.S. 567, 585-586, gave its “constitutional imprimatur to the top-two system,
 19 at least in dictum.” *Rubin*, 233 Cal. 4th at 1143. That is demonstrably wrong. Justice Scalia
 20 wrote the decision in *Jones*, yet he dissented in *Washington State Grange v. Washington State*
 21 *Republican Party*, 552 U.S. 442 (2008). Justice Scalia clearly envisioned a primary without party
 22 labels and that is not this Top-Two system.

23 The *Rubin* court understood this Top-Two system to be similar to the ballot access
 24 restrictions upheld in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), writing, incredibly,

25 _____
 26 ⁵ *See also*, Calao, Broockman, Huber, Kalla, *Tracing Polarization’s Roots: A Panel Study*
 27 *of Voter Choice in Congressional Primary and General Elections*. This article authoritatively
 28 argues that there is a big difference between the bases for voters to make far more informed
 decisions about candidates in a general election than in a primary election, emphasizing the
 distinctively different factors between the primary and general election forums.
https://osf.io/preprints/osf/7xbza_v1

that “[T]he 1 percent rule approved in *Munro* is constitutionally indistinguishable from the elimination of lesser candidates by the primary election under Proposition 14.” *Rubin, Id.* at 1147. In fact, the two are readily and materially distinguishable for constitutional analysis purposes and all other purposes. To meet the 1 percent requirement in *Munro* or any other “modicum of support” case, the minor party and its candidate do not have to actually beat the major party candidates who have far greater resources and organizational structures; they just have to get 1 percent of the votes in the primary (potentially along with many others in the field). In sharp contrast, under Top-Two, in a race in which there is at least one Republican and one Democrat candidate, the minor party and its candidate must actually beat a major party candidate in order to get access to a ballot from which he or she actually can be elected.

(2) The Primary Argument Made Here Was Not Made and Could Not Have Been Made in *Rubin*. Other Arguments Made in the FAC Also Were Not in *Rubin*

The *Rubin* court did not have before it a central argument made in the instant case – that the demonstrated history of the exclusion of minor parties from the general election ballot (and inclusion solely of Democratic or Republican Party candidates) in the hundreds of elections since the passage of Top-Two in which there is at least one Republican and one Democrat on the primary ballot constitutes an unconstitutionally severe burden not justified by any compelling state interest or the least restrictive means [ECF No. 29 at ¶27].

The instant case argues that in the thirteen years of experience since Top-Two’s enactment (and ten years since *Rubin* was decided), relevant ballot access history proves that the ballot access burden imposed by Top-Two is severe and unconstitutional. There was not any such argument before the court in *Rubin*, nor could there have been, and this is a vitally important argument in the context of a First and Fourteenth Amendments challenge to a ballot access barrier.

Though not determinative, “past candidates’ ability to secure a place on the ballot can inform the court’s analysis.” *Daien v. Ysursa*, 711 F. Supp. 2d 1215, 1230 (D. Idaho 2010); *See Storer v. Brown*, 415 U.S. 724, 742 (1974)(“ ... in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or

will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.”); *Mandel v. Bradley*, 432 U.S. 173, 177-178 (1977)(noting the importance of ballot access history and remanding based on the lower court’s failure to consider the history and other criteria required under *Storer*). *See also*, *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723 (9th Cir. 2015); *Ariz. Libertarian Party v. Bennett*, 784 F.3d 611 (9th Cir. 2015); *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 399 (8th Cir. 2020)(ballot history is important to consider in order to evaluate the necessity and burdensomeness of the restriction and to evaluate whether it reflects the least restrictive means).

Additionally, the *Rubin* court did not have before it the claim that the March deadline in a Presidential election year is unconstitutional. [ECF No. 29 at ¶¶33, 46]. The *Rubin* court understood the primary to be in June. *Rubin*, 233 Cal. App. 4th at 1137-1138. That is significant, as noted above and as the court in *Grange II* noted at 676 F.3d 794.

Also, the *Rubin* court expressly noted, the only arguments before it were from the perspective of the Party plaintiffs and not from the perspective of the plaintiffs in their roles as voters or candidates. *Rubin*, 233 Cal. App. 4th at 1144, n.9. Plaintiffs herein argue that their First and Fourteenth Amendment rights as Parties, voters, and candidates, respectively, are violated. [See FAC generally and especially ¶¶49, 50].

The fact that material legal arguments were not before the court whose decision a party seeks to use as a *res judicata* bar is a well-recognized basis for denying *res judicata* effect. *See e.g.*, *Libertarian Party of Ill. v. Ill. State Bd. of Elections*, 164 F. Supp. 3d 1023, 1031-1032 (N.D. Ill. 2016)(striking down Illinois’ full-slate ballot access requirement, notwithstanding several earlier decisions upholding it), *affirmed by Libertarian Party of Ill. v. Scholz*, 872 F.3d 518 (7th Cir. 2017).

Dismissing this constitutional challenge to Top-Two on behalf of voters, candidates, and political parties based on *res judicata* grounds when the *Rubin* court did not have that important ballot access legal argument or the underlying ballot access factual history would be an

inappropriate use of *res judicata*, would be wrong and, indeed, would be a manifest injustice. *See Montana v. United States*, 440 U.S. 147 (1979). Just as it would be inappropriate to allow collateral estoppel to bar later litigation where doing so would be a manifest injustice or where the issue is of significant importance, see *Kennedy v. Seattle*, 94 Wn.2d 376, 378-79 (1980), *Los Angeles v. San Fernando*, 14 Cal. 3d 199, 230, 537 P.2d 1250 (1975), it would truly be a manifest injustice to bar this case from going forward on *res judicata* grounds and to ignore the severe burden Top Two has created for small parties, candidates, and voters.

B. Defendant's Additional Arguments for Dismissal are Unavailing.

Pages 2-8 of the Defendant's Motion to Dismiss purport to provide the Court with some background, reference to the prior state court decision on which Plaintiff relies for her claim that "most of the political party Plaintiffs' claims are barred by *res judicata*," a rendition of the claims made by the Plaintiffs, and references to the standard for a Rule 12(b)(6) motion and the analytical framework for ballot access cases, and the [ECF No. 35 at 2-8].

The FAC [ECF # 29] speaks for itself as to Plaintiffs' allegations and, of course, the material allegations set forth in the FAC must be taken as true and must be construed in the light most favorable to the Plaintiffs. *Schultz v. Harry S. Truman Scholarship Found.*, 2023 U.S. Dist. LEXIS 40767, *5-6 (N.D. Cal., March 10, 2023)(Chesney, J.). All are more than plausible.⁶

Plaintiffs have set forth hereinabove a detailed explanation of the applicable analytic framework used in this Circuit and around the country for ballot access cases (The *Anderson/Burdick* framework) and rely on that in response to the version presented by the Defendant. (Section V. above)

⁶ Defendant asserts that, while the FAC purports to allege one cause of action, it really makes multiple separate claims [ECF No. 35 at 6]. The Defendant is mistaken. *Anderson* and all relevant ballot access authority directs that an evaluation in a ballot access challenge must look at the restrictions imposed as a whole in analyzing the severity of the burden, the legitimacy of the claimed State interests, and in considering less restrictive alternatives. The FAC challenges the Top-Two system as a whole and cites the restrictions at issue as unconstitutional in combination with each other. *See Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015); *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008). "[T]he burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain place on the ballot, or whether they will rarely succeed in doing so." *Id.* (quoting *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 763 (1994)); *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012).

At pages 8-11 of Defendant’s Motion to Dismiss, she presents her argument that some of the claims brought by some of the Plaintiffs are barred by *res judicata*, in light of the decision in *Rubin v. Padilla*, 233 Cal. App. 4th 1128 (2015) [ECF No. 35 at 8-11]. Plaintiffs have addressed above the reasons this Court should not find any claims by any Plaintiffs barred by *res judicata* and relies on that discussion in response to this portion of the Defendant’s Motion. (Section VI. A. above).

At pages 11-14 of Defendant’s Motion to Dismiss, she argues that “courts have already approved the Top-Two primary as a constitutional method of choosing general election candidates.” [ECF No. 35 at 12-14].⁷ Defendant points first to *California Democratic Party v. Jones*, 530 U.S. 567 (2000); but, of course, any such “approval” would be nothing more than *dicta* in that case which struck down as unconstitutional an earlier California version of a blanket primary and, as Defendant acknowledges, the case did not involve or address ballot access considerations [ECF No. 35 at 12].

Defendant next refers for support to the decision in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) [ECF No. 35 at 12]; but, of course, as the Court expressly noted, the constitutionality of ballot access considerations was not raised and was not in any way before the Court. *Id.* 552 U.S. at 458, n.11.

Defendant then refers for support to the decision in *Washington State Grange v. Washington State Republican Party*, 676 F.3d 784 (9th Cir. 2012) [ECF No. 35 at 12-14]. Defendant asserts that in that case, the Ninth Circuit approved a Top-Two system in Washington that was “very similar to California’s system challenged here.” [ECF No. 35 at 12]. However, Defendant omits a material fact from her argument: As noted above, the court in *Washington State Grange v. Washington State Republican Party* (“*Grange II*”), 676 F.3d 784, 794 (9th Cir. 2012), in considering that State’s Top-Two system noted the unconstitutional burden the Court in *Anderson* found a March deadline for minor parties and independents to be and expressly distinguished the Washington scheme because it provided for a primary “... **in August, not**

⁷ As noted above, one cannot fairly say that the Court in *Jones* approved a Top-Two system and certainly not one like the one at issue here, as Justice Scalia wrote the opinion in *Jones*, but dissented in *Washington State Grange* (“*Grange I*”).

1 **March.**” (Emphasis added). It is surprising that Defendant would omit that material fact from her
 2 argument, since she knows that one of the bases for Plaintiffs’ constitutional challenge here is to
 3 the March primary requirement of California’s Top-Two system in a Presidential election year
 4 (and June, not August, in a non-Presidential year) [See ECF No. 29 at ¶¶33, 46].

5 Finally, Defendant relies on the State court decision in *Rubin* [ECF No. 35 at 13-14]. The
 6 flaws with that argument are discussed at Section VI. A. (1) & (2) above and Plaintiffs will rely
 7 on that in response to this argument. The major flaw and distinguishing factor in Defendant’s
 8 argument in this regard, is that not one of the cases relied on had evidence of the severe burden
 9 that has been established by the exclusion of minor parties from the general election ballot in the
 10 more than a decade Top-Two has been in effect in every one of the hundreds of elections subject
 11 to Top-Two in which there has been at least one Democrat and one Republican in the race, with
 12 one anomalous exception in a local race [ECF No. 29 at 9 & n.3].

13 At pages 14-16 of Defendant’s Motion to Dismiss [ECF No. 35 at 14-16], she argues that
 14 the Top-Two system at issue does not pose a severe burden on Plaintiffs. Defendant’s argument
 15 once again ignores the allegations in the FAC regarding the history of exclusion in the more than
 16 a decade since the enactment of Top-Two and, indeed, ignores altogether the relevance of ballot
 17 access history under long-standing ballot access jurisprudence. Defendant’s argument is that
 18 where, as here, ready access to a primary election from which only the top two vote getters are
 19 given access to the general election ballot, is constitutionally sufficient to meet the Plaintiff
 20 parties’ candidates, and voters’ First and Fourteenth Amendment rights and she refers for support
 21 to *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). *Munro*, in sharp material contrast,
 22 was a modicum of support ballot access case in which a minor party candidate could gain access
 23 to the general election ballot by obtaining at least 1% of the votes cast in the primary. There was
 24 no limitation to only the top two finishers gaining ballot access; nor, most significantly, was a
 25 minor party required to beat major party candidates head to head, as the only possible route to
 26 general ballot access in a race in which there is at least one Democrat and one Republican in the
 27 primary. That is the case here.
 28

1 The amount of support a minor party candidate gets in a primary under the instant Top-Two
 2 system is irrelevant in such a race, so long as two major party candidates have more. Defendant
 3 ignores the cases that make clear it is access to the general election ballot that is key and
 4 especially for minor parties who need such access in order to grow and for voters who wish to
 5 vote for someone in a forum from which he or she can actually be elected to office who has a
 6 message that is different from the two major parties' message.

7 Defendant acknowledges that the *Anderson* court struck down a March deadline as
 8 unconstitutional, but argues, nonetheless, that the March primary date under Top-Two in a
 9 Presidential election year does not present any burden at all. Defendant asserts that the FAC does
 10 not provide any supporting authorities for its assertion or explain how it is a burden [ECF No. 35
 11 at 15]. Defendant is mistaken. Plaintiffs, of course, have no obligation to provide citations to
 12 authority in a Complaint; but these Plaintiffs actually have provided authority to numerous cases
 13 that have struck down similarly early deadlines and that explain the reasons why such early
 14 deadlines are unconstitutional [See ECF No. 29 at 14, n.11]. There are more.

15 Plaintiffs also refer in the FAC to the express notation by the *Grange II* court that in
 16 upholding the constitutionality of Washington's Top-Two system it did so based, in part, on the
 17 fact that the primary was in August and not March. [ECF No. 29 at 3, n.2]. *See also, Libertarian*
 18 *Party of Ohio v. Blackwell*, 462 F.3d 579, 590-591 (6th Cir. 2006)(collecting cases striking down
 19 early deadlines, applying strict scrutiny to early deadlines, and explaining the impact of early
 20 deadlines on minor parties); *Libertarian Party of Arkansas v. Thurston*, 962 F.3d 390, 400 (8th
 21 Cir. 2020)(explaining problems for minor parties and independents associated with early
 22 deadlines). The Court in *Williams v. Rhodes* 393 U.S. 23, 33 (1968) also emphasized the burden
 23 imposed on minor parties in particular by early deadlines:

24 Since the principal policies of the major parties change to some extent
 25 from year to year, and since the identity of the likely major party nominees may
 26 not be known until shortly before the election, this disaffected "group" will rarely
 27 if ever be a cohesive or identifiable group until a few months before the
 28 election. Thus, Ohio's burdensome procedures, requiring extensive organization
 and other election activities by a very early date, operate to prevent such a group
 from ever getting on the ballot and the Ohio system thus denies the "disaffected"
 not only a choice of leadership but a choice on the issues as well.

Defendant next argues that “California’s prohibition on write-in candidates also does not severely burden Plaintiffs.” [ECF No. 35 at 16]. Plaintiffs do not allege that the prohibition on write-ins standing alone is unconstitutional. Rather it is expressly alleged in the FAC that the prohibition on write-ins “in combination with” the other ballot access restrictions, violates the First and Fourteenth Amendment rights of the Plaintiffs in their respective capacities. [ECF No. 29 at ¶48]. Plaintiffs also do not suggest that allowing write-ins would cure the constitutional deficiencies in Top-Two. *See Anderson*, 460 U.S. at 799, n.26 (write-ins are not an adequate substitute for listing a candidate’s name on the printed ballot). Prohibiting write-ins is alleged to be an attribute of Top-Two that highlights that the only way to gain access to the general election ballot (or to be able to cast a vote that could result in the election of a voter’s choice) is by the candidate beating the major party candidates head to head in any primary in which there is at least one Democrat and one Republican candidate and that the general election ballot is limited to two candidates. As one court opined, if a route to general election ballot access is too difficult to meet and the only alternative route open is to appear as a write-in candidate, the candidate is “hobbled.” *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1361-1362 (N.D. Ga. 2016). This is all the more so when even write-ins are prohibited.

At pages 16-18 of the Motion to Dismiss, Defendant recites, without any meaningful justification, boilerplate, generic purported state interests which she claims support the restrictions on ballot access imposed by the Top-Two system. [ECF No. 35 at 16]. Not only does the Defendant fail to justify the claimed state interests or provide any meaningful actual relationship between them and the burden imposed, she asserts that she is not required to make any “particularized showing of the existence of the basis for the state interest prior to imposition of reasonable restrictions on ballot access or a showing as to the effects of its top-two primary system.” [ECF No. 35 at 16, n.7]. The assertion that the State has no obligation to justify its generic boilerplate re-tread claimed interests or to provide any evidence regarding their necessity and relationship to the burden imposed is contrary to abundant authority.

As noted above in Section V., the Court in *Anderson* expressly held that in passing judgment on the constitutionality of the ballot access restriction at issue, the Court must not only

determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson*, 460 U.S. at 789. (Internal citations omitted). *See also*, *Pierce v. Stapleton*, 505 F. Supp. 3d 1059, 1067 (D. Mont. 2020), *aff'd in part, rev'd in part and remanded sub nom. Pierce v. Jacobsen*, 44 F.4th 853 (9th Cir. 2022) ("A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."); *Nader v. Brewer*, 531 F.3d 1028, 1024 (9th Cir. 2008); *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018); *Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11th Cir. 1985); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1355-56, 1366-67 (N.D. Ga. 2016), *affirmed by and Opinion adopted in whole by Green Party of Georgia v. Kemp*, 674 Fed. Appx 974 (11th Cir. 2017), *rehearing and rehearing en banc denied* (11th Cir., March 31, 2017)(requiring the Secretary of State to prove the strength, legitimacy, and applicability of its claimed interests, consistent with long-standing precedent; reaffirming that a "litmus-test" approach is prohibited); *Green Party of Georgia. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. 2014)(Same).

The State cannot just rely on stating abstract interests that, perhaps, have been important or compelling in other cases where, as here, the ballot access restriction at issue does not advance those interests. *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 525 (7th Cir. 2017). In evaluating the State's purported interests, even when the burden is not found to be severe, the reviewing court must evaluate whether such purported interests serve the purpose the State claims they are needed for and whether other less restrictive means could be used to serve such State interests, to the extent the interests are deemed to be legitimate. *Soltysik v. Padilla*, 910 F.3d 438, 445-448 (9th Cir. 2018).

The Court in *Anderson* rejected the use of any "litmus-test" to "separate valid from invalid [ballot access] restrictions." *Anderson*, 460 U.S. at 789. Instead, a court determining whether a

1 challenged ballot access restriction is unconstitutional must: 1) evaluate the character and
 2 magnitude of rights protected by the First and Fourteenth Amendments; 2) identify the State's
 3 interests advanced as justifications for the burdens imposed by the ballot access restrictions; and
 4 3) evaluate the legitimacy and strength of each asserted state interest, and determine whether and
 5 to what extent those interests required burdening the plaintiffs' rights. *Id.*

6 In order to permit the required evaluation of competing interests, "[t]he State must
 7 introduce evidence to justify both the interests the State asserts and the burdens the State imposes
 8 on those seeking ballot access." *Id.*; *Bergland*, 767 F.2d at 1554. *See also, Mandel v. Bradley*,
 9 432 U.S. 173, 178 (1977)(Court must sift through conflicting evidence and make findings of fact
 10 as to the difficulty of obtaining signatures in time to meet the deadline); *Storer v. Brown*, 415
 11 U.S. 724 (1974)(a court is required to examine the facts and circumstances of each case
 12 individually and may not apply a "litmus test"); *Democratic Party v. Reed*, 343 F.3d 1198, 1205-
 13 1207 (9th Cir. 2003)(a determination about the validity and justification for the purported State
 14 interests vis a vis the burden imposed is not to be made in the abstract; rather the court must
 15 evaluate whether the specific purported interest is actually addressed by the law; rejecting "voter
 16 choice" and "voter participation" as justifying interests for a blanket primary).

17 Plaintiffs must be given the opportunity to develop an evidentiary record to demonstrate the
 18 burden and to show that the restriction at issue does not advance, let alone serve the State's
 19 purported interests. *Soltysik, Id.* at 447. In the instant case, as plausibly alleged in the FAC [ECF
 20 No. 29 at ¶¶35-40], (undisputed in the Motions to Dismiss), and as will be discussed below, the
 21 history we now have in the years since the passage of Top-Two demonstrates beyond any
 22 question that the State's purported interests have actually been undermined by Top-Two.

23 Notwithstanding Defendant's assertion that she need not provide justification for the
 24 claimed interests "prior to imposition," the present procedural posture is now after their
 25 imposition to deny Plaintiffs access to the ballot and the opportunity to vote for their candidate
 26 and issues in the general election. The court in *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d
 27 1340, 1366, n. 16 (N.D. Ga. 2016) noted this distinction and in response to the exact claim the
 28

1 Defendant here makes, required the Secretary of State to demonstrate the importance of his
2 claimed interests and to show how the restrictions advanced those claimed interests.

3 The Defendant claims that the burden imposed by the Top-Two system is justified by State
4 interests in (1) increasing voter choice and voter participation; (2) streamlining the ballot; (3)
5 avoiding ballot overcrowding; and (4) reducing voter confusion. [ECF No. 35 at 16-17]. These
6 generic, boilerplate, retread purported interests provide no meaningful justification for the burden
7 imposed and, based on the evidence now adduced after more than a decade of having Top-Two in
8 place, certainly are not served by the Top-Two system.

9 As alleged in the FAC, without any dispute in the Motions to Dismiss, voter participation
10 has decreased since Top-Two was enacted [ECF No. 29 at ¶¶38-39]. This makes sense since
11 voters who previously could vote in the general election for an alternative to the two major parties
12 now have no such opportunity. Top-Two certainly does not serve an interest in increasing voter
13 choice, again, as alleged in the FAC without dispute in the Motions to Dismiss [ECF No. 35 at
14 ¶40]. With the enactment of Top-Two, voters in the general election, the only forum from which
15 a person can actually be elected to govern and carry out policy that might be of interest to or drive
16 a voter, the “voter choice” is limited to a maximum of two candidates.

17 The last three purported interests claimed by the Defendant are all remarkably similar –
18 streamlining the ballot, avoiding ballot overcrowding, and avoiding voter confusion.

19 It is the height of absurdity to even suggest that there is a legitimate, let alone compelling,
20 state interest in limiting access to the general election ballot to two candidates in order to avoid
21 ballot overcrowding or voter confusion. Indeed, in his concurrence in *Williams*, Justice Harlan
22 expressly opined that “the presence of eight candidacies cannot be said, in light of experience, to
23 carry a significant danger of voter confusion.” *Williams*, 393 U.S. 23, 47 (1968).

24 Moreover, it borders on hypocrisy to argue that limiting the general election ballot to two
25 candidates is necessary to avoid ballot overcrowding and voter confusion when the primary
26 election is filled with many more candidates, given the low threshold Defendant boasts about for
27 access to the primary. See *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1366 (N.D. Ga.
28 2016). This is even more emphatically so when, as here, Defendant argues that access to the

primary is a constitutionally adequate substitute for access to the general election ballot or, as the *Rubin* court found at the State's behest, the primary under Top-Two is "constitutionally indistinguishable" from the general election and, indeed, constitutes the election, with the general election being the "run-off." *Rubin*, 233 Cal. App. 4th at 1135, 1146.⁸

Logically, the same interests and concerns for the State should apply with respect to the Top-Two primary; but that clearly is not the case and that severely undermines the legitimacy, let alone compelling nature claimed to attend these purported interests. Moreover, "streamlining the ballot" when it comes to the general election ballot directly undermines the interest in "voter choice."⁹

Defendant argues at pages 18-19 of her Motion to Dismiss that Plaintiffs' Equal Protection Claim has no merit because all parties, big and small are treated the same under Top-Two, with the same opportunity to qualify as a top two finisher in the primary in order to gain general election ballot access. [ECF No. 35 at 18-19]. Ballot access equal protection claims are evaluated under the *Anderson/Burdick* framework just like First Amendment claims. *Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Dudum v. Arntz*, 640 F.3d 1098, 1106, n.15 (9th Cir. 2011). Plaintiffs rely on the *Anderson/Burdick* analysis discussed herein in response to Defendant's Equal Protection argument.

Plaintiffs would add the following in response: "Under the Equal Protection Clause 'sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.'" *Merrifield v. Lockyer*, 547 F.3d 978, 985-986 (9th Cir. 2008)(citing *Cornwell*

⁸ "When the State makes the primary an "integral part of the procedure of choice," every eligible citizen's right to vote should receive the same protection as in the general election." *United States v. Classic*, 313 U.S. 299, 318 (1941); *Gray v. Sanders*, 372 U.S. 368 (1963). *Clingman v. Beaver*, 544 U.S. 581, 610 (2005)(Stevens, J. dissenting).

⁹ The following is just one example that demonstrates the danger of Top-Two's "streamlining" that limits the number of candidates on the general election ballot to two. In 1999, in a California special election, Green Party candidate Audie Bock ran in a blanket primary. She finished third behind two Democrats and, of course, under Top-Two, her candidacy would have been over, only the two Democrats would have advanced to the general election ballot and voters could not have cast their vote for the Green Party candidate. However, California law at the time provided for the top vote-getter from each party to advance to the general election ballot. Audie Bock won the general election with 50.55% of the vote.

<https://elections.cdn.sos.ca.gov/sov/2000-primary/special.pdf>

1 *v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) and *Craigsmiles v. Giles*, 312 F.3d 220 (6th
2 Cir. 2002) as two cases in which an Equal Protection violation was found notwithstanding
3 treatment for the plaintiffs that was the same as for other groups under the challenged statutory
4 framework).

5 Asserting that the two major parties are treated just like the minor parties under the Top-
6 Two system brings to mind the famous Anatole France quote: “The law, in its majestic equality,
7 forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal
8 bread.”¹⁰ As the court wrote in *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1362 (N.D.
9 Ga. 2016), “... burdens that fall on new or smaller parties fall disproportionately on ‘those voters
10 whose political preferences lie outside the existing political parties.’ *Anderson*, 460 U.S. at 793-
11 94, citing *Clements v. Fashing*, 457 U.S. 957, 964 (1982)).”

12 Forcing minor parties to beat out major parties head to head just to gain access to the
13 general election ballot is not treating them alike in reality. They are minor parties still because
14 they do not yet have the financial and other resources that the Democrats and Republicans have
15 thus far in America and if the barrier to general election ballot access imposed by Top-Two,
16 leaving this as the only route and limiting the ballot to two candidates remains in place, minor
17 parties cannot grow into parties able to compete. Being kept off the general election ballot
18 unquestionably stifles a minor party’s ability to grow.

19 In referring to the lesser resources of minor parties competing to put forward their
20 candidates and viewpoints, the Court wrote in *Williams*, granting “the States power to keep all
21 political parties off the ballot until they have enough members to win would stifle the growth of
22 all new parties working to increase their strength from year to year.” *Williams*, 393 U.S. at 32.

23 Finally, Defendant argues at pages 20-21 of her Motion to Dismiss that Plaintiff American
24 Solidarity Party’s Challenge to the “Party Preference” requirement fails for not alleging sufficient
25 facts [ECF No. 35 at 20-21]. Defendant asserts that she does not understand the claim and that it

26 ¹⁰ Jacques Anatole Francois Thibault (“Anatole France”), *The Red Lily* [1894], Ch. 7.
27 Louisiana tried to justify its requirement that all candidates alike have their race listed on the
28 ballot. The Court rejected this “alleged equality” argument as “superficial” just as it is here.
Anderson v. Martin, 375 U.S. 399, 404 (1964).

fails Rule 8's pleading requirement. Of course, the FAC cites to *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018) and to the statutory provision that bars it from listing its party name on the ballot and this should be sufficient to establish standing and to state the claim.¹¹ But if the Court is not satisfied with that, Plaintiffs certainly can file a Second Amended Complaint for that or any other purpose directed.

VII. CONCLUSION

For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.

Norman v. Reed, 502 U.S. 279, 288 (1992).

There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Williams v. Rhodes, 393 U.S. 23, 32 (1968).

When the variety and number of political parties increases, the chance of oppression, factionalism, and non-critical acceptance of ideas decreases.

James Madison

In our political life, third parties are often important channels through which political dissent is aired: "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society."

¹¹ See also, Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties*, 44 Loy. L.A. L. Rev. 463 (2011) (arguing for strict scrutiny in light of the burden imposed by Proposition 14).

1 *Williams v. Rhodes*, 393 U.S. 23, 39 (Douglas, J., Concurring), *quoting from*, *Sweezy v. New*
2 *Hampshire*, 354 U.S. 234, 250-251 (1957).

3 The Motions to Dismiss must be denied. For the reasons set out above, this action is not
4 barred by *res judicata*. There is now compelling historical evidence that the effect of Top-Two
5 over the course of more than a decade in which it has been in place has been to present an
6 insurmountable barrier to the election of a minor party candidate for public office in every race
7 subject to Top-Two in which there is at least one Democrat and Republican in the race. The
8 single anomalous local exception in 2014 which Plaintiffs identified, among the hundreds of
9 elections at issue, does not render the barrier any less onerous. This evidence has never been put
10 before a court and it is directly relevant both to the severity of the burden and the
11 legitimacy/efficacy of the purported state interests used to attempt to justify the extreme burden.
12

13 Putting the matter in terms contemplated by the *Anderson/Burdick* framework, Plaintiffs
14 can demonstrate from an unbroken history since Top-Two was enacted (and in sharp contrast
15 with the minor party ballot access history that preceded Top-Two) that the burden Top-Two
16 presents on minor parties, their candidates, and voters who would like to cast their votes for
17 candidates and policies other than those offered by the two major parties is a severe one.
18

19 As the Supreme Court recognized almost sixty years ago, "The right to vote is heavily
20 burdened if that vote may be cast only for one of two parties at a time when other parties are
21 clamoring for a place on the ballot." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).
22

23 Top-Two provides only one avenue for minor parties to gain access to the general election
24 ballot and one can only gain access to elective office if one is on the general election ballot.
25 Concomitantly, one can only cast a vote for a candidate or viewpoint outside of those
26 representing the two major parties if a third-party candidate can gain access to the general
27 election ballot. "The absence of any alternative means of gaining access to the ballot inevitably
28

renders the California system exclusionary as to some aspirants.” *Lubin v. Panish*, 415 U.S. 709, 718 (1974). *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1363 (N.D. Ga. 2016) (finding a severe burden and applying strict scrutiny when “the restrictions at issue in this case serve to prevent minor parties from engaging in the fundamental political activity of placing their candidate on the general election ballot”).

It is not a constitutionally sufficient answer to say that all parties are treated the same with the same chance to enter the blanket primary and finish in the top two – and especially not when we have the undeniable history of the exclusion from the general ballot for minor parties when they have to go head-to-head with the major parties. Top-Two is not based on a showing of a modicum of support in order to gain general election ballot access. Rather, it is a device created by legislators from the two major parties that ensures that those two major parties will maintain the right to govern, at the expense of the minor parties who have lesser resources and seek to grow, but cannot grow without access to the general election ballot for their members, supporters, and voters to see. This is the very dynamic Justice O’Connor warned about in her concurring opinion in *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., Concurring).¹² Indeed,

¹² “Although the State has a legitimate -- and indeed critical -- role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.”

1 the Top-Two system, like another state's system struck down as unconstitutional, "serves to
 2 protect the two major parties at the expense of political dialogue and free expression, which is not
 3 justified, much less compelling." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th
 4 Cir. 2006).

5
 6 Smaller political parties have played a significant role in the American political system
 7 through our nation's history. As Justice Marshall wrote long ago:

8 "The States' interest in screening out frivolous candidates must be considered in light of the
 9 significant role that third parties have played in the political development of the Nation.

10 Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral
 11 success." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979);

12 *See also, Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1352-53 (N.D. Ga. 2016), *affirmed*

13 *by Green Party of Ga. v. Kemp*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017); *See*

14 *also, J. David Gillespie, Challengers to Duopoly, Why Third Parties Matter in American Two-*
 15 *Party Politics* (University of South Carolina Press 2012 ed.)

16 <https://www.jstor.org/stable/j.ctv6wgjrr>; Adams, James, and Samuel Merrill, *Why Small, Centrist*

17 *Third Parties Motivate Policy Divergence by Major Parties*. The American Political Science
 18 Review, vol. 100, no. 3, 2006, pp. 403–417. JSTOR, www.jstor.org/stable/27644363.

19
 20 None of the proffered State interests put forward by the Defendant can justify the severe
 21 burden on Plaintiffs' ability to gain access to the general election ballot or to cast their votes to
 22 elect a candidate of choice; indeed, as discussed above, Top-Two has either been proven to
 23 undermine those purported interests entirely or is far too restrictive in allowing only two
 24 candidates on the ballot; but in any event there is no legitimate, relevant, compelling interest that
 25 justifies the imposition of Top-Two. The following excerpts from two landmark ballot access
 26 cases poignantly express the constitutional imperative to rein in overly restrictive ballot access
 27
 28

1 initiatives and to require truly compelling state interests that actually apply when minor parties,
 2 candidates, and voters face a burden like that imposed by Top Two:

3 “For more than two decades, this Court has recognized the constitutional
 4 right of citizens to create and develop new political parties. The right derives from
 5 the First and Fourteenth Amendments and advances the constitutional interest of
 6 like-minded voters to gather in pursuit of common political ends, thus enlarging
 7 the opportunities of all voters to express their own political
 8 preferences. See *Anderson v. Celebrezze*, 460 U.S. 780, 793-794, 75 L. Ed. 2d
 9 547, 103 S. Ct. 1564 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*,
 10 440 U.S. 173, 184, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979); *Williams v. Rhodes*,
 11 393 U.S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968). To the degree that a State
 would thwart this interest by limiting the access of new parties to the ballot, we
 have called for the demonstration of a corresponding interest sufficiently weighty
 to justify the limitation, see *Anderson, supra*, at 789, and we have accordingly
 required any severe restriction to be narrowly drawn to advance a state interest of
 compelling importance. See *Socialist Workers Party, supra*, at 184, 186.”

12 *Norman v. Reed*, 502 U.S. 279, 288-289 (1992).

13 “Restrictions on access to the ballot burden two distinct and fundamental
 14 rights, “the right of individuals to associate for the advancement of political
 15 beliefs, and the right of qualified voters, regardless of their political persuasion, to
 16 cast their votes effectively.” *Williams v. Rhodes, supra*, at 30. The freedom to
 17 associate as a political party, a right we have recognized as fundamental, see 393
 18 U.S., at 30-31, has diminished practical value if the party can be kept off the
 19 ballot. Access restrictions also implicate the right to vote because, absent recourse
 20 to referendums, “voters can assert their preferences only through candidates or
 21 parties or both.” *Lubin v. Panish*, 415 U.S. 709, 716 (1974). By limiting the
 22 choices available to voters, the State impairs the voters' ability to express their
 political preferences. And for reasons too self-evident to warrant amplification
 here, we have often reiterated that voting is of the most fundamental significance
 under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964);
Reynolds v. Sims, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330,
 336 (1972). When such vital individual rights are at stake, a State must establish
 that its classification is necessary to serve a compelling interest. *American Party of*
Texas v. White, 415 U.S. 767, 780-781 (1974); *Storer v. Brown*, 415 U.S. 724, 736
 (1974); *Williams v. Rhodes, supra*, at 31.”

23 *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

24 Plaintiffs have alleged plausible facts in support of a cognizable legal theory. The Motions
 25 to Dismiss must be denied. Plaintiffs must be permitted to develop a record in this case to fully
 26 demonstrate the severity of the burden imposed on them in their respective roles as parties,
 27 candidates, and voters and to demonstrate that the interests the Defendant claims justify the Top-
 28

Two restrictions that have kept minor parties off of the general election ballots do not justify such restrictions. Plaintiffs must also be permitted to develop a record, through expert testimony and otherwise of the availability and greater efficacy of alternative election systems that would meet any legitimate ballot access State interest.¹³

There truly are “strands of liberty” interwoven with questions of ballot access, as the Court wrote in *Anderson*, 460 U.S. at 787. Ballot access restrictions implicate the different, but overlapping, right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. As our courts have recognized, the candidates who appear on the ballot are crucial to the voters' exercise of those First and Fourteenth Amendment rights, for “voters can assert their preferences only through candidates or parties or both.” *Anderson*, 460 U.S. at 787.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

Plaintiffs must be permitted to have that voice by having a real, achievable avenue to gain access to the general election ballot in order to get elected to govern and in order to be able to

¹³ Naturally, if Top-Two is struck down as unconstitutional as applied, it will be for the State to determine the best alternative to address the constitutional deficiencies as a matter of first course. Plaintiffs must be given the opportunity to put in evidence, through an expert and otherwise, regarding alternative systems in place now in other states that meet legitimate regulatory interests while not limiting the general election ballot to two candidates. The simplest alternatives that come to mind would be systems in Arizona, Colorado, Maine, and New Mexico, for example that have partisan primaries with independents allowed to vote in the primaries. The much touted “Top-Four” system in Alaska would be an alternative to consider as well, with a minor party candidate able to gain general ballot access since it has been in use, given the expansion of the field from two to four candidates. There are many other alternatives Plaintiffs would present which would be relevant under *Anderson/Burdick* and beyond.

1 meaningfully exercise their right to vote. Plaintiffs must be permitted to pursue their First and
2 Fourteenth Amendment claims.

3 Respectfully Submitted,

4 /s/ Soyeun D. Choi

5 (SBN 211344)

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on this 26th day of June, 2025, I caused a copy of the foregoing
23 Memorandum of Points and Authorities in Opposition to Defendant's and Intervenor-Defendants'
24 Motions to Dismiss to be served on all counsel of record by filing the same in this Court through
25 the ECF system.

26 /s/ David I. Schoen

27 Counsel for Plaintiffs (*pro hac vice*)